APPELLANT PRO SE:

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IN THE COURT OF APPEALS OF INDIANA

DAVID I. FRANKLIN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 07A05-0607-PC-405
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BROWN CIRCUIT COURT
The Honorable Judith A. Stewart, Judge
Cause No. 07C01-0401-FC-33

January 17, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

David I. Franklin, *pro se*, appeals the denial of his petition for post-conviction relief (PCR). We affirm.

FACTS AND PROCEDURAL HISTORY

On August 19, 1998, September 19, 2001, and February 28, 2002, Franklin was convicted of operating a vehicle while intoxicated (OVWI).[1] On March 27, 2002, the Bureau of Motor Vehicles notified Franklin his driving privileges were being suspended for ten years because he was a habitual traffic violator (HTV). On January 21, 2004, Franklin crashed the car he was driving, and his six-year-old passenger was seriously injured. At the time of the accident, Franklin's blood alcohol content was 0.26. The State charged Franklin with operating a motor vehicle while suspended as a Class D felony,[2] and OVWI causing serious bodily injury as a Class C felony.[3] The State also alleged Franklin was an habitual substance offender (HSO),[4] listing his OVWI convictions in 1998, 2001 and 2002 as the predicate offenses.[5]

In August 2004, Franklin pled guilty to operating while suspended, OVWI with serious bodily injury, and the HSO enhancement. The trial court sentenced Franklin to three years for driving while suspended and six years for OVWI with serious bodily

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[1] Franklin was also convicted of "operating per se" on July 8, 1994. (App. at 52.)
[2] Ind. Code § 9-30-10-16(a)(1).
[3] Ind. Code § 9-30-5-4(a)(3). Driving while intoxicated is a Class D felony. It is a Class C felony if the defendant has a prior operating while intoxicated conviction within five years.
[4] Ind. Code § 35-50-2-10.
[5] At least three substance offense convictions are involved in an habitual substance offender adjudication—two "prior unrelated substance offense convictions" and a third conviction to which the habitual substance offender finding is "attached." *See* Ind. Code § 35-50-2-10(b). In this context, the third, or current, offense is referred to as the "underlying" offense while the prior unrelated substance offense convictions are known as "predicate" or "prior" offenses.

injury, to be served concurrently. It enhanced his sentence by four years based on the HSO adjudication. Franklin's total sentence was ten years, the maximum allowed by the plea agreement.

In August 2005, Franklin filed a PCR petition. The post-conviction court denied the petition in July 2006:

> **[FINDINGS OF FACT]**
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> 4. On August 4, 2005, Franklin (hereinafter "Petitioner") filed his Petition for Post-Conviction Relief. The Court granted amendments to the initial Petition on subsequent dates. Prior to the hearing on the Petition, Petitioner filed his Motion for Summary Judgment on Petition for Post-Conviction Relief. In his Motion, Petitioner withdrew all claims for relief except a claim based on the double jeopardy provision [of the Indiana Constitution].
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> * * * * *
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> 6. Petitioner claims that his conviction for Operating a Motor Vehicle After Being Adjudged an Habitual Traffic Offender as a Class D felony violates double jeopardy under the Indiana State Constitution under the "actual evidence" test. Petitioner does not claim that his counsel was ineffective.
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> **CONCLUSIONS OF LAW**
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> * * * * *
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> 2. The Petitioner waived the right to challenge his conviction on double jeopardy grounds by pleading guilty. *Mapp v. State*, 770 N.E.2d 332, 334-5 (Ind. 2002). *See also Games v. State*, 743 N.E.2d 1132 (Ind. 2001).
>
> 3. Even if the claim was not waived, Petitioner's convictions do not violate the double jeopardy provisions of the Indiana Constitution either as a "double enhancement," Schnepp v. State, 768 N.E.2d 1002 (Ind.App. 2002); *Howard v. State*, 818 N.E.2d 469 (Ind.Ct.App. 2004), or as a violation of Indiana's actual evidence test. The evidentiary facts that established each of the Defendant's convictions established only one or some, but not all, of the essential elements of the other offenses. There is no double jeopardy violation, Spivey v. State, 761 N.E.2d 831 (Ind. 2002).

(App. at 15-16.)

DISCUSSION AND DECISION

Post-conviction proceedings are not "super appeals" through which convicted persons can raise issues they failed to raise at trial or on direct appeal. *McCary v. State*, 761 N.E.2d 389, 391 (Ind. 2002), *reh'g denied*. Rather, post-conviction proceedings afford petitioners a limited opportunity to raise issues that were unavailable or unknown at trial and on direct appeal. *Davidson v. State*, 763 N.E.2d 441, 443 (Ind. 2002), *reh'g denied, cert. denied* 537 U.S. 1122 (2003); *see also* Ind. Post-Conviction Rule 1(1)(a). Post-conviction proceedings are civil in nature, and petitioners bear the burden of proving their grounds for relief by a preponderance of the evidence. P-C.R. 1(5).

When a petitioner appeals the denial of post-conviction relief, he appeals from a negative judgment. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004). Consequently, we may not reverse the post-conviction court's judgment unless the petitioner demonstrates that the evidence "as a whole, leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court." *Id.*

The post-conviction court is required to make specific findings of fact and conclusions of law on all issues presented. P-C.R. 1(6). We accept the post-conviction court's findings of fact unless they are clearly erroneous, but we do not give deference to the post-conviction court's conclusions of law. *Davidson*, 763 N.E.2d at 443-44. On appeal, we examine only the probative evidence and reasonable inferences that support the post-conviction court's determination. *Conner v. State*, 711 N.E.2d 1238, 1245 (Ind. 1999), *cert. denied* 531 U.S. 829 (2000). We do not reweigh the evidence or judge the credibility of the witnesses. *Id.*

Franklin argues "the two offenses of Operating a Motor Vehicle While Intoxicated Causing Serious Bodily Injury . . . enhanced by the Habitual Substance Offender . . . and Operating a Motor Vehicle after being Adjudged an Habitual Traffic Offender," (Br. of Appellant at 7), violate Article I, Section 14 of the Indiana Constitution under the actual evidence test enunciated in *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999). The State responds Franklin waived his double jeopardy claim by pleading guilty.

Defendants who plead guilty to achieve favorable outcomes waive a plethora of substantive claims and procedural rights, including challenges to convictions that would otherwise constitute double jeopardy. *Davis v. State*, 771 N.E.2d 647, 649 n.4 (Ind. 2002); *see also O'Connor v. State*, 789 N.E.2d 504, 510 (Ind. Ct. App. 2003) ("Our supreme court has repeatedly held that a defendant waives his or her claims of a double jeopardy violation by pleading guilty."), *trans. denied* 804 N.E.2d 746 (Ind. 2003).

Franklin briefly argues his plea was not made knowingly, intelligently and voluntarily. He asserts he did not intend "to waive any protection afforded him against double jeopardy violations" by entering into the plea agreement. (Reply Br. of Appellant at 2.) He states the trial court did not specify he was waiving this right: "If such a waiver was enunciated by either the State or the trial court, then Franklin would not have agreed to this stipulation and refused to agree to the terms of the plea. Thus Franklin's plea was not made knowingly, intelligently and voluntarily." (*Id.* at 3.) We disagree.

To demonstrate his intent to preserve his protections against double jeopardy, Franklin quotes a portion of his colloquy with the trial court at the first plea hearing concerning the rights he had and was giving up. At one point, Franklin asked whether he

would be waiving his right to present "any additional information that would result in . . in my benefiting my situation after this plea has been accepted." (App. at 64.) The first plea hearing was apparently ended because of Franklin's questions and a second plea hearing was held. At the beginning of the second plea hearing, the trial court stated: "I'm going to start over in terms of the dialogue and make sure that you are aware of the rights that are available to you and that you give up by pleading guilty and also make sure that you are, in fact, guilty of the offense." (*Id.* at 65.) During the ensuing colloquy, Franklin affirmed he understood he was "waiving or giving up every single one of," (*id.* at 67), the rights the trial court had listed including the right "to appeal that conviction to a higher court in case I made errors here in this court." (*Id.* at 66.) Franklin has not demonstrated his plea was not made knowingly, intelligently, and voluntarily.

Next, Franklin asserts he "did not receive a favorable outcome resulting from his plea agreement relating to double jeopardy issues pertaining to his HTO conviction." (Reply Br. of Appellant at 4.) We disagree. Franklin could have received up to three years for driving while suspended,[6] eight years for OVWI with serious bodily injury,[7] and eight years for being a habitual substance offender.[8] If the sentencing court had ordered the terms to be served consecutively, Franklin would have faced a total sentence of eighteen years.[9] Instead, the agreement included a sentencing cap of ten years. An eight-

[6] Ind. Code § 9-30-10-19, Ind. Code § 35-50-2-6.
[7] Ind. Code § 9-30-5-4, Ind. Code § 35-50-2-7.
[8] Ind. Code § 35-50-2-10.
[9] Pursuant to Ind. Code § 35-50-1-2(c), the total of the consecutive terms of imprisonment in this case is limited to ten years. The habitual substance offender enhancement is excluded from this cap.

year reduction in potential jail time is a favorable outcome of a plea agreement. Thus, Franklin's argument he did not benefit under the plea agreement also fails.

Franklin has not demonstrated his guilty plea was not made knowingly, intelligently, and voluntarily. His guilty plea was made in exchange for a ten-year sentencing cap. He has waived his right to challenge the resulting convictions on the basis of double jeopardy. *Davis*, 771 N.E.2d at 649 n.4. Accordingly, we affirm.

Affirmed.

NAJAM, J., and MATHIAS, J., concur.